

## **SECTION 103 AWARD AND EXECUTION OF CONTRACT**

### **103.01 CONSIDERATION OF PROPOSALS.**

After the Proposals are opened and read, each Bidder's multiplication and addition will be verified or corrected. In case of a discrepancy between a unit bid price and the extension, the unit bid price shall govern, unless the intent of the bid is obvious. The Proposals will be compared on the basis of the correct totals, and the results of such comparison promptly made public. The Department reserves the right to reject any and all Proposals, to waive technicalities, or to advertise for new Proposals.

A Bidder who wishes to claim error after the bids have been publicly opened and read shall promptly notify the Department that an error occurred. The Bidder shall submit a notarized affidavit or declaration, under penalty of perjury, signed by the Bidder and accompanied by the work sheets used in the preparation of the bid, requesting relief from forfeiture of the bid bond and the responsibilities of award. The affidavit or declaration shall describe the specific error(s) and certify that the work sheets are the ones used in preparing the bid.

The affidavit or declaration shall be submitted no later than 5:00 p.m. on the first business day after bid opening or the claim will not be considered. The Department will review the affidavit or declaration and the certified work sheet to determine the validity of the claimed error and if the error is of the kind for which the law allows relief from forfeiture of the Proposal guaranty. If the Department concurs in the claim of error and determines that the error is of the kind which allows relief from forfeiture, the Bidder will be relieved of responsibility and the Proposal guaranty of the Bidder will be returned. If the Department does not concur in the error or determines that the error is not the kind for which the law allows relief, the Department may award the Contract and if the Bidder refuses to execute the Contract, the Bidder's Proposal guaranty shall be forfeited as required by Section 103.07.

### **103.02 AWARD OF CONTRACT.**

The award of the Contract, if made, will be to the lowest responsible Bidder whose Proposal complies with the requirements specified. The award will be made within 30 days after opening the Proposals unless an extension of this limit is agreed to in writing by both parties. If the Federal Government, other state agency, county, city, or other participating party pays any or all costs of Project construction, any award made shall not be final until concurrence has been received from the participating parties.

The successful Bidder shall submit a schedule of proposed progress as specified in Section 108.01 B. The time schedule submitted on the proposed progress chart shall not change the Contract requirements listed in the Proposal Form.

Contract award is subject to the license requirements referenced in subsection 102.02. A foreign corporation must have a certificate of authority to do business in North Dakota before a Contract can be awarded.

**103.03 CANCELLATION OF AWARD.**

The Department reserves the right to cancel the award of any Contract before execution without liability.

**103.04 RETURN OF PROPOSAL GUARANTY.**

All Proposal Guaranties, except in cases of default and those of the Bidders submitting the 3 lowest bids, will be returned after Proposals have been compared. The Proposal Guaranty of the Bidder submitting the lowest bid may be cashed and the money retained until the Contract has been awarded and properly executed. The Proposal Guaranties of the remaining 2 Bidders will be returned after the Contract is executed.

All Proposal Guaranties, except in case of defaults, will be returned upon request within a reasonable time and as provided by law.

**103.05 REQUIREMENT OF CONTRACT BOND.**

- A. **General.** Upon execution of the Contract, the successful Bidder shall furnish a Contract Bond on the form furnished in an amount equal to 100% of the Contract, issued by a responsible Surety, and approved by the Director. If the Surety Bond is voided or is no longer in force, the Contractor shall obtain another Contract Bond of an amount equal to the original.
- B. **Measurement and Payment.** The cost of the Contract Bond is included as a separate bid item in the Proposal. After the Contract is signed, payment for the item "Contract Bond" will be made as follows:
  - 1. A written request for payment of Contract Bond items shall be submitted to the Department's district office supervising the work. If the work is on the county highway system, the request for payment shall be submitted to the County Engineer or the county's Consultant Engineer. The request for payment shall be accompanied by a receipted invoice from the bonding firm showing the Contract Bond cost and the date payment was made by the Contractor.
  - 2. An estimate, subject to retainage as provided in Section 109.05, will be processed to provide a lump sum payment equal to the Contract Bid Price or the actual cost indicated by the bonding firm's invoice, whichever is less. If the price bid for the item "Contract Bond" exceeds the cost indicated by the invoice, the remaining amount will be paid on the final estimate.

**103.06 EXECUTION AND APPROVAL OF CONTRACT.**

The signed Contract and Contract Bond shall be returned to the Department within 10 calendar days after the date of notice of Contract award. No Contract will be considered binding until execution by all parties to the Contract.

**103.07 FAILURE TO EXECUTE CONTRACT.**

Failure by the successful Bidder to execute a Contract and file a satisfactory Contract Bond will be considered cause for annulment of the award and forfeiture of the Pro-

posal guaranty to the Department. Award may then be made to the next lowest responsible Bidder, or the work may be readvertised.

### 103.08 ESCROW OF BID DOCUMENTATION.

- A. **General.** When specified, the Contractor shall submit a legible copy of the documentation used to prepare the bid for this Contract. The bid documentation shall be placed in escrow with a banking institution or other bonded document storage facility and preserved by that institution/facility as specified in this section.
- B. **Affidavit.** In addition to the bid documentation, the Bidder shall submit an affidavit, signed under oath by the Bidder or a representative of the Bidder authorized to execute Bid Proposals listing each bid document submitted by author, date, nature, and subject matter. The affidavit shall attest that the signer has personally examined the bid documentation, that such documentation is listed in the affidavit, and all bid documentation is included in the submission to the Department.
- C. **Submittal and Return of Bid Documentation.** The apparent low bidder shall submit the affidavit and the original bid documentation in a sealed container to the Department within 5 working days after the bid opening. The container shall be clearly marked "Bid Documentation" and shall show on the face of the container the Bidder's name and address, date of submittal, Project Number, and Contract Number.

If the proposal of the apparent low bidder is rejected by the Department, the bid documentation, if already submitted, will be returned; and the next low responsive bidder will be notified to submit its affidavit and bid documentation. The bidder will be allowed 5 working days after date of notification by the Department to submit the required documents. If this Proposal and subsequent ones are also rejected, the above procedures will continue until a Bidder's Proposal is accepted by the Department.

- D. **Duration and Use.** After award, the Department and the Contractor will jointly deliver the sealed container and affidavit to a banking institution or other bonded document storage facility selected by the Department for placement in a safety deposit box, vault, or other secure accommodation. The Department will provide escrow instructions to the document storage facility consistent with this Section.

The agreement with the document depository will reflect that the bid documentation and affidavit will remain in escrow during the life of the Contract or until the Department is notified of the Contractor's intention to file a claim for extra compensation according to Section 104.06 or to initiate litigation or arbitration against the Department related to the Contract. Notification of the Contractor's intention to file a claim, or initiation of litigation or arbitration against the Department, will be sufficient grounds for the Department to obtain the release and custody of the bid documentation. If such action has not been initiated, and the required statutory time to file a Contract claim has elapsed since the submission of the final estimate the document depository will be instructed to release the sealed container to the Contractor.

In accordance with the affidavit attesting that the sealed container placed in escrow contains all of the materials relied upon to prepare the bid, the Contractor agrees to waive its right to use any bid documentation other than that placed in escrow in any claim or litigation arising out of this Contract.

- E. **Refusal or Failure to Provide Bid Documentation.** Failure to provide the bid documentation shall render the bid non-responsive.
- F. **Confidentiality of Bid Documentation.** The bid documentation and affidavit in escrow are, and shall remain, the property of the Contractor. The Department has no interest in, or right to, the bid documentation unless notification of the intention to file claim is received or litigation ensues between the Department and Contractor. In the event of such notification or litigation, the bid documentation and affidavit will become the property of the Department; provided that these materials, and all copies made by the Department, are returned to the Contractor at the conclusion of litigation, or final resolution of all outstanding claims, upon execution of a final release.
- G. **Payment.** The cost of placing the bid documentation into escrow is included as a separate bid item in the Contract. After the bid documentation has been deposited in a storage facility and the Contract has been signed, payment for the entire lump sum item, "Escrow of Bid Documentation" will be made to the Contractor on the first estimate prepared after the documents have been placed in escrow. The Contractor shall be responsible for the payment of the depository rent.

These payments will be full compensation for all data compilation, container, storage rental, and any other associated costs; and no other payments will be made to the Contractor for this bid item.

## SECTION 104 CONTRACT ADJUSTMENTS

### 104.01 INTENT OF CONTRACT.

The Contractor shall furnish all resources required to complete the work and shall execute the work according to the terms of the Contract.

### 104.02 SUBLETTING OF CONTRACT.

The Contractor shall not sublet, sell, transfer, assign, or dispose of any portion of the Contract or Contracts without written consent of the Engineer. The maximum percentage that can be sublet shall be 70%, of the Total Contract Amount, excluding any designated specialty items of work. The amount of any specialty items performed shall be deducted from the total original Contract Amount before computing the percentage of work sublet. Requests for permission to sublet shall be submitted to the District Engineer in whose District the Project is located. The request shall be in writing on Department forms accompanied by evidence showing that the organization performing the work is experienced and equipped for such work. Subcontract work shall not begin until the "Request to Sublet" is approved. The Department's approval of the "Request to Sublet" does not create a contractual relationship between the Department and the